SUPREME COURT, U. S.

Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-488

JAMES W. HARTLEY, LEONARD L. McCURDY, E. A. FALLS, H. L. HORN, J. ELDON HART, GORDON H. MASSEY, JR., ROBERT D. MASSENGALE, E. SHAYNE RICHIE, and DONALD BROWN, *Petitioners*,

v.

CITY OF CHATTANOOGA, a municipality within the State of Tennessee; and MAYOR ROBERT KIRK WALKER, COMMISSIONER JOHN FRANKLIN, COMMISSIONER STEVE CONRAD, COMMISSIONER PAT ROSE, and COMMISSIONER EUGENE ROBERTS, in their capacity as Board of Commissioners of Chattanooga, Tennessee, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

JAMES W. HARTLEY, LEONARD L. McCURDY, E. A. FALLS, H. L. HORN, J. ELDON HART, GORDON H. MASSEY, JR., ROBERT D. MASSENGALE, E. SHAYNE RICHIE, AND DONALD BROWN,

Petitioners,

v.

CITY OF CHATTANOOGA, a municipality within the State of Tennessee; and MAYOR ROBERT KIRK WALKER, COMMISSIONER JOHN FRANKLIN, COMMISSIONER STEVE CONRAD, COMMISSIONER PAT ROSE, and COMMISSIONER EUGENE ROBERTS, in their capacity as Board of Commissioners of Chattanooga, Tennessee,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

The petitioners, James W. Hartley, et al, pray that the writ of certiorari issue to review the Opinion of the Supreme Court of the State of Tennessee as rendered in these proceedings on July 29, 1974.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

This case originated in the Circuit Court of Hamilton County, Tennessee. The Honorable Sam Boaz rendered a decision in favor of the Respondents against Petitioners. A copy of the Trial Court's Final Decree appears in the appendix, p. 11. The case was appealed to the Supreme Court of the State of Tennessee sitting at Knoxville, Tennessee. That Court rendered a judgment in favor of Respondents. This opinion appears in the appendix, p. 15.

No petition to rehear was filed because as a general rule under Tennessee law a petition to rehear will be refused where no new argument is made, no new authority is adduced, and no material fact is pointed out as overlooked. All facts and issues were before the Supreme Court.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that the final judgment of the Tennessee Supreme Court was rendered on July 29, 1974. This petition for writ of certiorari was filed within ninety (90) days of said date. The statutory provisions granting this Court jurisdiction to review the decision of the Supreme Court of the State of Tennessee is 28 U.S.C.A. Sec. 1257 (3).

Judgment of the State Court becomes final for purposes of review in the U. S. Supreme Court by writ of error or certiorari upon the date of the denial or other disposition of such case. *Citizens Bank v. Hopperman*, (IND. 1919) 39 S. Ct. 330, 249 U.S. 448, 63 L. Ed. 701.

This proceeding arose in the Circuit Court of Hamilton County, Tennessee, wherein the petitioners contended that the attempted annexation by the City of Chattanooga of the areas involved in this litigation should be declared a nullity and void on the grounds that the annexation was attempted in a manner in contravention of the various state statutes that the respondents contend they annexed under. In addition, and of utmost importance in this petition, petitioners state that their constitutional rights, both federal and state, were violated.

The Trial Court held that the attempted annexation was sustained by the proof as required by T.C.A. Sec. 6-303, *et seq.* The attempt was void because the respondents had not followed the law of the State of Tennessee which required the submission of a plan of services which was never submitted.

It is respectfully insisted that before the decision of the Supreme Court of the State of Tennessee upholding this annexation, that the legislature of the State of Tennessee amended the statute which had previously placed the burden of proof on annexation matters upon those opposing annexation. The burden was such that petitioners had the burden of proving that the annexation was unreasonable.

The Legislature amended the law before this case was decided providing that the burden of proof should be upon the city. (Public Acts 1974, App. p. 27.) That this action of the Legislature of the State of Tennessee vested rights upon citizens who are the subject of subsequent annexation attempts, when these petitioners were deprived of that right, particularly when the Legislature in the act amending the annexation statute specifically excluded therefrom any litigation which was then pending. (Public Acts 1974, App. p. 27.)

Petitioners insist that when the Legislature amended the proceedings that this case should have been remanded so as to give these petitioners the same rights as other citizens of the State of Tennessee now have.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional question was ignored by both the trial court and the Supreme Court of the State of Tennessee.

AMENDMENT V of the United States Constitution guarantees that "no person shall be deprived of life, liberty or property, without due process of law".

AMENDMENT XIV, Sec. 1 of the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of laws; nor to deny any person within its jurisdiction his equal protection of the laws."

It is a basic legal principle that one cannot be deprived of his property by state action without due process of law. *Wojnicz v. Michigan Department of Corrections*, (1971) 188 N.W.2d 251, 32 Michigan, app. 121.

Due process of law is secured against state action by this clause. *State v. Percy*, (1958) 248 N.C. 334, S.E.2d 404.

Judicial decree which violates vested rights is within the prohibition of the due process clause. *Lander v.*

Siegel, (1930) 298 Pa. 487, 148 A. 699; *Nesbit v. Riesman*, (1930) 298 Pa. 475, 148 A. 695, *cert. denied* 50 S. Ct. 480, 281 U.S. 754, 74 L. Ed. 1164.

The Federal guarantee of due process extends to state action through judicial as well as legislative, the executive or the administrative branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, (1930) 50 S. Ct. 541, 281 U.S. 673, 74 L. Ed. 1107.

Citizens may not be deprived of property without due process of law. *Williams v. White Plains Housing Authority*, (1970) 309 N.Y.S.2d 454, 622 Misc. 2d 613. The word "property" as used in this amendment includes every interest anyone may have in any and everything that is subject to ownership by man, together with the right freely to possess, enjoy or dispose of same, and the right of user cannot be wholly taken away or limited by the state except insofar as it may become necessary for individual rights to yield to the best interest of the people.

THE QUESTIONS PRESENTED FOR REVIEW

I. WERE PETITIONERS' CONSTITUTIONAL RIGHTS VIOLATED UNDER AMENDMENT XIV, SECTION 1, OF THE UNITED STATES CONSTITUTION?

II. WAS THE TERRITORY IN QUESTION PROPERLY ANNEXED UNDER THE PROVISIONS OF T.C.A. SEC. 6-309, *ET SEQ.*?

III. WERE PETITIONERS' CONSTITUTIONAL RIGHTS VIOLATED WHEN THE LAW ON ANNEXATION WAS AMENDED TO MATERIALLY AFFECT THE PETITIONERS' RIGHTS AS TO BURDEN OF PROOF SINCE ALL CITIZENS OF TENNESSEE SUBJECT OF FUTURE ANNEXATION BY MUNICIPALITIES HAVE THE BENE-

FIT OF THE AMENDED STATUTE WHICH PLACES THE BURDEN OF PROVING THE REASONABLENESS OF SUCH PROPOSED ANNEXATIONS UPON THE MUNICIPALITY AND NOT UPON THOSE OPPOSING ANNEXATION?

STATUTES INVOLVED IN THE CASE

There are included in the Appendix hereto, pp. 22-26, the statutes of the State of Tennessee involved in this case, to wit: Sec. 6-309, T.C.A.; Sec. 6-310, T.C.A.; and Sec. 6-317, T.C.A.

STATEMENT OF THE CASE

This matter is one of four annexations of various areas by the City of Chattanooga all of which were consolidated for trial at the conclusion of which the Trial Court upheld the annexation of this area and one other area but denied the annexation of two other areas.

On February 2, 1972, the City of Chattanooga passed numerous ordinances annexing the areas involved and passed a resolution containing a plan of services.

Petitioners filed *quo warranto* proceedings, docket number 16202 in the Circuit Court of Hamilton County, Tennessee contesting the annexation. The plan of services presented was based on Chapter 420 of the Public Acts of 1971 by the Tennessee Legislature, popularly known as the Variable Tax Act. A public hearing was held as required and the ordinances were adopted by the City of Chattanooga.

Chapter 420 of the Public Acts of 1971, allowing the use of the variable tax rates under which the City pro-

posed the annexation involved herein was declared unconstitutional in December, 1972. (*Frost v. City of Chattanooga*, 448 S.W.2d 370, December, 1972.) Petitioners filed a motion for summary judgment setting out the unconstitutionality of the act thereby claiming that the annexation was not in accordance with the law. The matter came on for trial on March 19, 1973, at the beginning of which the motion for summary judgment was overruled.

The Trial Court upheld the annexation. Petitioners filed Motions for new trial which were overruled, and appeal granted, and the petitioners appealed the Trial Court's ruling to the Tennessee Supreme Court.

While the appeal was pending and before the hearing the Legislature of the State of Tennessee amended T.C.A. Secs. 6-309, 6-310, 6-317, amending the procedural aspects to place the burden of proof on the municipality which had this amendment been enforced may have affected the opinion of the Trial Court because upon trial of the case the burden of proof was of the petitioners. The amending act specifically provided that it would not affect pending litigation. This action results in a situation where citizens of the State of Tennessee who are the subject of future annexations will have rights which were denied these petitioners. Petitioners contend that this situation violates their rights to equal treatment under the law and to due process under the State Constitution as well as the United States Constitution.

FACTS RELEVANT TO THE ISSUES

(1) The respondents undertook this annexation under authority of 6-309 T.C.A. (Variable Tax Act). The respondents had the Legislature enact what was known as the variable tax act which provided that annexed areas

would be taxed only on the basis of services which the municipality could render.

(2) Section 6-309, T.C.A. was held to be unconstitutional. (*Frost v. City of Chattanooga*, 448 S.W.2d 370, December, 1972.) Petitioner raised this objection but the Trial Court proceeded, allowing the respondents to modify the plan of services, some modifications of which came in the course of the trial.

(3) Before the matter was heard by the Tennessee Supreme Court the Legislature again amended the statutes under which the respondents were proceeding, to shift the burden of proof in annexation proceedings from those opposing annexation to the municipality. The same statute proved that this amendment would not apply to litigation in existence at the time of the amendment. This action by the Tennessee Legislature imposed duties on these petitioners and the residents in their area which are greater than those imposed on other citizens in future annexation proceedings. (Chapter 753, Public Acts of 1974, March 28, 1974, App. p. 27.)

ARGUMENTS

The respondents enacted the ordinances annexing the area in which the petitioners reside by a three (3) to two (2) vote. The annexation was attempted in compliance with the statutes of the State of Tennessee then in existence (6-309, T.C.A., *et seq.*). One of the requirements was that the City of Chattanooga submit a plan of services. A plan of services was submitted based upon the Variable Tax Act (6-309, T.C.A.) which provided that citizens in this area would be taxed on the basis of the services which the municipality was able to provide.

Petitioners agree that respondents had followed the law as it then applied.

Before this matter was tried in the Trial Court the law under which the respondents were proceeding was declared unconstitutional which in effect resulted in a proposed annexation for which there was no effective plan of services. (For purpose of argument the plan of services unfolded during the trial of the case.) Petitioners had prepared their lawsuit based on the statute then in force but when that statute was determined to be unconstitutional by the Supreme Court of the State of Tennessee, then petitioners were called upon to contest the annexation on a different basis. That is, that no plan of services was available to be tested by the petitioners herein.

While this matter was on appeal to the Tennessee Supreme Court the Legislature amended the statutes relating to annexation to shift the burden of proof from those opposed to annexation to the municipality attempting to annex. Petitioners and residents living in this area have been annexed under a law which is no longer in force.

Petitioners insist that their rights were further violated by the Legislature of the State of Tennessee in enacting a statute which gave rights to one class of citizens and denied the same rights to these petitioners and residents living in their area. This was remedial legislation but was not applied to these petitioners.

CONCLUSION

It is submitted that petitioners' basic constitutional rights were violated in this cause. It is obvious that annexation occurred by an illegal and unconstitutional manner, in direct contradiction of the statutes of the State of Tennessee and in direct opposition to the finding of the Tennessee Supreme Court which held unconstitutional the very act under which the respondents were proceeding.

Petitioners and residents in their area were denied rights which other citizens now have and this right was taken from them during the course of the proceedings.

A companion case, Lucius P. Hobson, et al versus the same respondents, is being filed simultaneously, and involves the same issues raised herein.

For the foregoing reasons, petitioners pray that a Writ of Certiorari be issued to review the Opinion of the Supreme Court of the State of Tennessee.

Respectfully submitted,

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APPENDIX

[fol. 1]

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, ex rel., OTIS O'DELL, et al v. CITY OF CHATTANOOGA, et al	No. N-16198
STATE OF TENNESSEE, ex rel., ROBERT J. HICKS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16199
STATE OF TENNESSEE, ex rel., JAMES W. HARTLEY, et al vs. CITY OF CHATTANOOGA, et al	No. N-16202
STATE OF TENNESSEE, ex rel., NELL JOHNS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16209

FINAL DECREE (INCORPORATES AMENDMENT TO MEMORANDUM)

These causes came on to be heard from March 19, 1973, through March 29, 1973, before the Honorable Sam Boaz, Judge of Law and Equity, sitting specially, having been designated by the Chief Justice of the Supreme Court of Tennessee to hear these cases. Said causes, having

been consolidated for trial purposes, came on to be heard upon the original complaints, the answers of defendants, testimony of witnesses in open Court, a tour of the areas to be annexed by the court and counsel, and the entire record as a whole, from all of which the Court is of the opinion, for the reasons stated in its Memorandum Opinion, filed July 6, 1973, and its Amendment to Memorandum filed July 23, 1973, which are hereby ordered
[fol. 2] incorporated herein and made a part hereof by reference, and which are directed to be made a part of the record of these causes, that the annexation of the areas known as 13-A, being the North Mountain Creek area, and 9-B, being the East Brainerd area, by the City of Chattanooga, is not unreasonable in consideration of the health, safety and welfare of the citizens and property owners, both of the city and of the territories being annexed, and in view of the proof of the ability of the City to provide the usual municipal services, and especially in view of the overwhelming proof that the city's natural growth is to the north and east, and the validity of the ordinances annexing said areas should be sustained. Further, for the reasons set forth in the Memorandum Opinion filed July 6, 1973, the Court is of the opinion that the ordinances annexing the areas known as Area 4, Tiftonia, and Area 12, Wauhatchie-Williams Island, are unreasonable and should be vacated.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court:

1. That Ordinances No. 6389 and 6395 of the City of Chattanooga, Tennessee, annexing the areas referred to as East Brainerd and North Mountain Creek, along with Ordinances No. 6390 and 6396, providing for taxation thereof, and Resolutions No. 9164 and 9167, providing

for Plans of Services, be and hereby are declared valid and the same are hereby in all respects sustained.

2. That, as provided by Tennessee Code Annotated Section 6-310, said ordinances shall become operative thirty-one (31) days after the entry of this Decree.

3. That Ordinances No. 6393 and 6397 of the City of Chattanooga, Tennessee, be and are hereby de-
[fol. 3] clared unreasonable, and the same shall be vacated, along with Ordinances No. 6394 and 6398, providing for taxation, and Resolutions No. 9166 and 9168, providing Plans of Services.

4. That the costs of Cases No. 16198 and 16199 are adjudged against the defendant City of Chattanooga, and the costs of Cases No. 16202 and 16209 are adjudged against the respective Relators and the sureties on their costs bonds, and for the collection of which execution may issue.

To the actions of the Court in Cases No. 16202 and 16209, in sustaining the validity of the ordinances and resolutions annexing the East Brainerd and North Mountain Creek areas, and to the adverse facts of this Final Decree, the respective Relators excepted, and now except, and pray for an appeal to the next term of the Supreme Court sitting at Knoxville, which appeal is hereby granted upon their perfecting an appeal as required by law.

To the actions of the Court in Cases No. 16198 and 16199, in declaring the ordinances and resolutions annexing Tiftonia and Wauhatchie-Williams Island unreasonable and vacating the same, and to the adverse facts of this Final Decree, the defendant, City of Chattanooga, et al, excepted, and now except, and pray for an appeal to the next term of the Supreme Court, sitting at Knoxville,

which appeal is hereby granted upon their perfecting an appeal as required by law.

This the ____ day of _____, 1973.

_____
JUDGE

APPROVED FOR ENTRY:

_____
Counsel for Otis O'Dell, et al

_____
Counsel for Robert J. Hicks, et al

[fol. 4]

_____
Counsel for James W. Hartley, et al

_____
Counsel for Nell Johns, et al

_____
Counsel for City of Chattanooga, et al

[fol. 1]

IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE, EX REL.,
JAMES W. HARTLEY, ET AL.,
Petitioner,
VS.
CITY OF CHATTANOOGA,
TENNESSEE, ET AL.,
Respondent.

STATE OF TENNESSEE, EX REL.,
NELL JOHNS, ET AL.,
Petitioner,
VS.
CITY OF CHATTANOOGA,
TENNESSEE, ET AL.,
Respondent.

HAMILTON COUNTY LAW, HONORABLE SAM E. BOAZ, JUDGE

For Petitioner:

Ralph E. Vineyard,
Chattanooga, Tennessee.

Glenn R. Copeland,
Chattanooga, Tennessee.

For Respondent:

Eugene N. Collins,
Chattanooga, Tennessee

Randall L. Nelson,
Chattanooga, Tennessee.

OPINION

(Filed July 29, 1974)

In 1971, the City of Chattanooga initiated by ordinances the annexation of several adjacent areas of the City, and upon final passage of the ordinances, actions were brought in the Courts of Hamilton County "in the nature of quo warranto" by residents of the various areas. Four of

said suits were brought in the Circuit Court of Hamilton County, and in the various suits they are referred by areas as follows: Case Number N-1619, "Tiftonia"; Case Number N-16199, "Wauhatchie"; Case Number N-16202, "North Mountain Creek"; and Case Number N-16209 as "East Brainerd". For the purpose of a hearing, these four cases were consolidated, and [fol. 2] were heard by Honorable Sam E. Boaz, as Special Judge by designation of the Chief Justice of the Tennessee Supreme Court. Oral proof on the questions raised was heard from March 19, 1973, through March 28, 1973. In a memorandum opinion, the Court vacated the ordinances annexing the areas known as "Tiftonia" and "Wauhatchie", and the city appealed. The trial judge sustained the ordinance annexing the areas of "North Mountain Creek" and "East Brainerd" and the plaintiffs have appealed. In this opinion only the action of the trial judge in sustaining the ordinances applying to "North Mountain Creek" and "East Brainerd" is involved, and the relators in each case has filed similar assignments of error as follows:

"1. The decision of the court is contrary to the law and the evidence.

"2. The Public Acts of 1955 and amendments thereto permitting annexation violate the Fifth and Fourteenth Amendments of the Constitution of The United States and the Constitution of The State of Tennessee, Article one sections 8 and 21, and Article 11, section 8.

"3. The defendants failed to afford an opportunity to speak to all who desired at its public hearing held on January 24, 1972.

"4. Defendants never adopted a plan of services as required by the Public Acts of 1955, codified in

T.C.A. 6-309 relative to annexation. Defendants' so-called "plan of services" proposed under Chapter 420, Public Acts of 1971, "The Variable Tax Act", was clearly unconstitutional and void.

"5. The court erred when it refused to permit plaintiffs to re-open their proof and allow additional proof when plaintiffs' discovered new, material evidence that they were unable, with due diligence, to discover prior to the trial of this cause."

The trial judge in his memorandum summarized the testimony as follows:

"In general, as to the four areas to be annexed, it was shown by the plaintiffs that the county was able to provide health services, a planning commis-
[fol. 3] sion, police protection through its Sheriff's Department, pollution control, a landfill operation, county roads and county schools, that water and electricity were available, that septic tanks were reasonably efficient, that private garbage collection and fire protection were available, that some recreational facilities were available, and that the health safety and welfare of the citizens of these areas was not endangered and that the prosperity of the residents of the affected areas and the municipality would not be materially retarded if the annexation were not permitted. The plaintiff's proof was that the city had failed adequately to provide the services mentioned within the present city and that it would not be financially able to provide the services to the annexed areas; that, consequently it would be unfair to raise their taxes for services not received. It was, therefore their position that annexation of these four areas was unreasonable under all the circumstances.

"On the other hand, it was shown by the city that the areas in question had no fire protection comparable to what the city could offer (and ltimately a lowering of insurance rates), that the city could provide better police protection, and that the schools would have available more funds, with a maller teacher-pupil ratio, that the health of these areas was endangered due to percolation problems with regard to septic tanks and that the county had never provided sanitary sewers, whereas the city could, that the county does not provide refuse and garbage collection, nor recreational facilities, nor street lighting, nor traffic engineering, nor certain inspection services, which services could and would be provided by the city. Further, that the vast majority of the people in the proposed areas work in the city, that their economic opportunities were provided by the city, that recreational facilities were provided and could be better provided by the city, that the airport was provided by the city, that cultural advantages were provided by the city and utilized by county residents and that it was necessary and right that the tax burden for all such services be equitably distributed. It was shown that the city was financially able to and would provide the usual municipal services in accordance with the schedule of services, or before the dates scheduled."

Immediately preceding the foregoing summary of evidence, the trial judge made the following observation:

[fol. 4] "Historically, municipalities have found it necessary to expand their city boundaries, and that is why the Legislature has adopted statutes setting out the procedure to be followed.

"The growth pattern of the City of Chattanooga, as in many other cities in the past few decades, reflects a move by many people to the suburbs. Thus, proof shows that Hamilton County in 1950, had a population of 208,255 and in 1970, the population was 255,007. The City of Chattanooga had a population in 1950, of 131,041 and yet in 1970, its population had decreased to 119,923. Certain segments of the population, referred to as the middle class, move out of the city and the city loses their support and their participation in the tax structure. Therefore, without going into great detail, it clearly appears that the City of Chattanooga has found it necessary to expand its boundaries. *The determination of this question, as provided by the State Legislature, is a legislative function of the city. The question before the Court is as to its reasonableness.*" (Emphasis added.)

In all of these annexation cases now before this Court, including a companion case appealed from the Chancery Court of Hamilton County, the procedure followed by the City prior to passage of the final ordinances was the same. In each case the plans of services were based upon a comprehensive study of all areas surrounding and adjacent to the City of Chattanooga. In the companion case from the Chancery Court of Hamilton County, styled *State of Tennessee, Ex. Rel. Lucius P. Hodson, et. al.*, we have today released an opinion wherein the procedure followed by the City prior to the final passage of the ordinances was discussed and held to be in compliance with the statutory provisions. All constitutional questions which could be raised were presented in that case and found to be without merit. Thus, assignments two and four are overruled.

[fol. 5] As for assignment three, there is no requirement that every person attending the public hear-

ing be afforded the opportunity to speak. *cf.*, State of Tennessee ex rel. Stall et al. v. City of Knoxville, 211 Tenn. 271, 364 S.W. 2d 898 (1962). Moreover, assuming *arguendo* that there is such a right, there is no evidence in the record that anyone from this area was denied an opportunity to speak. On the contrary, the record reveals that the Mayor "tried to recognize everybody that had called for recognition..." In view of the aforesaid, we overrule assignment three.

The remainder of the assignments can be disposed of by determining whether the trial judge applied the proper rule of law in passing upon the facts as he found them to be from all of the evidence.

In *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W. 2d 924, (1960), this Court set out the proper rule of law to be applied in annexation cases as follows:

> "* * * the court does not, in any sense, substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; *its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, a fairly debatable one*; if there is such, then the discretion of the legislative body is conclusive. Citing authorities." (Emphasis added.)

Since *Morton*, that rule has been uniformly and consistently followed by the Courts of Tennessee. In the recent case of *State ex. rel. Wood, et. al. v. City of Memphis*, (Released for publication on June 3, 1974.) ___ S.W. 2d___ (Tenn. 1974), we said:

"it is obvious that in the annexation of territory, someone must fix the boundaries, and whether [fol. 6] said boundaries are fixed pursuant to the annexation statute contained in T.C.A. §6-309 or directly by the legislature, *it remains a legislative matter and will not be disturbed by this Court unless the action was arbitrary and unreasonable.* On the question of reasonableness, we realize that in every annexation case there are both advantages and disadvantages to annexation. Nevertheless, if a debatable question exists as to whether the advantages outweigh the disadvantages, then the court must rule in favor of the annexation. Stated another way, if the reasonableness of the annexation is a debatable question, then the court will uphold the validity of the annexation." (Emphasis added.)

When the evidence found in the record is read in light of the foregoing rules of law, it is clear that said evidence raised a fairly debatable question. Therefore, the City's legislative body did not act arbitrarily and in excess of its legislative powers by annexing North Mountain Creek and East Brainerd, and the Chancellor correctly sustained the validity of the ordinances involved therein.

In view of the foregoing, it necessarily follows that the trial court is sustained and these cases are remanded back to said trial court for enforcement of its final decree.

/s/ W. M. Leech
W. M. LEECH, SPECIAL JUSTICE.

CONCURRING:
DYER, C. J.,
CHATTIN, J.,
McCANLESS, J.,
FONES, J.

TENNESSEE CODE ANNOTATED

* * *

6-309. Annexation by ordinance.—A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed.

Anything contained in chapter 3 of title 6 to the contrary notwithstanding, a municipality in any county having a population of over sixty-six thousand (66,000) (except in those counties having a population of more than seven hundred thousand (700,000) according to the United States census

of population of 1970 or any subsequent federal census; or in those counties which have the metropolitan form of government) shall have the supplemental right and authority to annex upon its own initiative by ordinance any territory without levying any municipal ad valorem taxes except for actual municipal services rendered, and that the residents of, and persons owning property in, annexed territory shall be entitled to rights and privileges of citizenship, in accordance with the provisions of the annexing municipality's charter, immediately upon annexation as though such annexed territory had always been a part of the annexing municipality; and it shall be the duty of the governing body to put into effect with respect to an annexed area any charter provisions relating to representation on the governing body. Any municipality that exercises such right to annex is hereby authorized, required and shall levy separate ad valorem taxes for each municipal purpose and/or service within the existing limits of the city and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal service or purpose for which such taxes have been imposed is actually being rendered; provided however, that in the case of sanitary sewers, such sewers shall be furnished within thirty-six (36) months after ad valorem taxes become due.

In counties having a population of more than seven hundred thousand (700,000), or having a population of not less than two hundred and sixty thousand (260,000) nor more than two hundred and eighty thousand (280,000) according to the United States census of population of 1970 or any subsequent federal census, or in those counties which have the metropolitan form of government, a smaller municipality may, by ordinance, extend its corporate limits by annexation of any contiguous territory, when

such territory within the corporate limits of a larger municipality is less than seventy-five (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such, shall not be required of the smaller municipality for such annexation. [Acts 1955, ch. 113, §2; 1961, ch. 320, §1; 1969, ch. 136, §1; 1971, ch. 420, §§1, 2, 3; 1972 (Adj. S.), ch. 844, §1.]

* * *

6-310. Quo warranto to contest annexation ordinance.— Any aggrieved owner of property lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with §§6-308 – 6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits, shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Should the court find

the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance, an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attack in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden of proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants.

During the time that any annexation ordinance is being contested as provided herein, the annexing municipality and the county governing body (and/or any affected school, sanitary or utility district) may enter into an agreement to provide for new, expanded, and/or upgraded services

and facilities (including, but not limited to, equipment, land, and buildings), and capital expenditures (including sale of bonds) to finance such services and facilities, which agreement shall include an equitable division of the cost and liabilities of such capital expenditures between the annexing municipality and the county governing body (and/or affected school, sanitary, or utility district) upon final determination of such contested annexation ordinance. [Acts 1955, ch. 113, §2; 1961, ch. 220, §1; 1970 (Adj. S.), ch. 516, §1.]

* * *

6-317. Priority of larger municipalities in annexation.—Nothing in §§6-308—6-320 shall be construed to authorize annexation proceedings by a smaller municipality with respect to territory within the corporate limits of a larger municipality. If two (2) municipalities shall initiate annexation proceedings with respect to the same territory, the proceedings of the municipality having the larger population shall have precedence and the smaller municipality's proceedings shall be held in abeyance pending the outcome of the proceedings of such larger municipality. Provided, however, that a smaller municipality may, by ordinance, extend its corporate limits by annexation of any contiguous territory, when such territory within the corporate limits of a larger municipality is less than seventy-five (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such, shall not be required of the smaller municipality for such annexation. [Acts 1955, ch. 113, §8; 1969, ch. 136, §2.]

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[fol. 1] **PUBLIC CHAPTER NO. 753**

HOUSE BILL NO. 228

By Ashe, Carter W. L., Smith, Atchley (Knox), Mann, Robinson (Washington)

Substituted for: Senate Bill No. 647

By Henry, Albright, Roberson

AN ACT to amend Tennessee Code Annotated, Sections 6-309, 6-310, 6-317 relating to annexation to provide: the minimum services to be identified, the burden of proving reasonableness and necessity of the annexation, the initiation of annexation with respect to competing municipalities, and to grant standing to a smaller municipality; and to provide a new section for Title 6, Chapter 3 relative to approval of changes in the plan of services.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 6-309 is amended by adding, after the first sentence of the second paragraph, the following:

The plan of services, to be identified, shall include but be not limited to: police protection, fire protection, water service, electrical service, sanitary sewage system, solid waste disposal, road and street construction and repair, recreational facilities, and the zoning services which the municipality shall enact for the territory proposed to be annexed; provided such plan may except such services which are being provided by another public agency or private company in the area to be annexed.

SECTION 2. Tennessee Code Annotated, Section 6-309 is amended by inserting at the end of the second paragraph the following:

Prior to the adoption of the plan of services, a municipality shall hold a public hearing. Notice of the time and place of the public hearing shall be published in a newspaper of general circulation in the municipality seven (7) days prior to the hearing. The notice shall include the locations of a minimum of three (3) copies of the plan of services which the municipality shall provide for public inspection during all business hours from the date of notice until the public hearing.

SECTION 3. Tennessee Code Annotated, Title 6, Chapter 3 is amended by adding the following section:

[fol. 2] Upon the expiration of a year from the date any annexed area for which a plan of service has been adopted becomes a part of the annexing municipality, and annually thereafter until services have been extended according to such plan, there shall be prepared and published in a newspaper of general circulation in the municipality a report of the progress made in the preceding year toward extension of services according to such plan, and any changes proposed therein, and the governing body of the municipality shall publish notice of a public hearing on such progress reports and changes, and hold such hearing thereon. Any changes in the plan of service shall be incorporated in a resolution approved by the governing body of the municipality. Any owner of property in an annexed area to which such plan and progress report are applicable may file a suit for mandamus to compel the governing body to comply with the requirements of this paragraph.

SECTION 4. Tennessee Code Annotated, Section 6-310, is amended by adding the following after the first paragraph:

The municipality shall have the burden of proving that an annexation ordinance is reasonable for the overall well-being of the communities involved.

SECTION 5. Tennessee Code Annotated, Section 6-317 is amended by adding the following after the second sentence:

Annexation proceedings shall be considered as initiated upon passage on first reading of an ordinance of annexation. If the ordinance of annexation of the larger municipality does not receive final approval within one hundred eighty (180) days after having passed its first reading, the proceeding shall be void and a smaller municipality shall have priority with respect to annexation of the territory; provided its annexation ordinance shall likewise be adopted upon final passage within one hundred and eighty (180) days after having passed its first reading. When a larger municipality initiates annexation proceedings for a territory which could be subject to annexation by a smaller municipality, the smaller municipality shall have standing to challenge the proceedings in the chancery court of the county where the territory proposed to be annexed is located.

[fol. 3] Tennessee Code Annotated, Section 6-317 is further amended by adding to the first sentence after the words "large municipality" the following:

nor by a larger municipality with respect to territory within the corporate limits of a smaller municipality in existence for ten or more years.

SECTION 6. Nothing contained in this Act shall affect annexation proceedings initiated prior to the effective date of this Act.

SECTION 7. If any section or provision of this chapter shall be declared unconstitutional or void by a court of competent jurisdiction, or the application thereof to any person or circumstances shall be held invalid, the constitutionality and validity of the remainder of this chapter and the applicability thereof to other persons and circumstances shall not be affected thereby, and to this end the sections and provisions of this chapter are declared to be severable.

SECTION 8. The provisions of this Act shall not apply to counties of the state having a population of not less than 65,000 nor more than 66,000 according to the federal census of 1970 or any subsequent federal census.

SECTION 9. This Act shall not apply to any municipality in counties having a population of more than 600,000 according to the Federal Census of 1970, or any subsequent Federal Census. Provided, that this act will not apply to any county having a Metropolitan form of Government, or having a population 400,000 or more according to 1970 U. S. Federal Census or any subsequent census.

SECTION 10. This Act shall take effect on becoming a law, the public welfare requiring it.

PASSED: March 28, 1974

/s/ Ned R. McWherter
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ John S. Wilder
SPEAKER OF THE SENATE

APPROVED: April 5, 1974

/s/ Winfield Dunn
GOVERNOR